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In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, PETITIONER

v.

VIRGINIA ELECTRIC AND POWER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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v.

VIRGINIA ELECTRIC AND POWER COMPANY

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The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on October 5, 1959.

OPINIONS BELOW

The district court did not write an opinion. The opinion of the court of appeals (App., *infra*, pp. 18–29) is reported at 270 F. 2d 707. Earlier opinions in this case are reported at 218 F. 2d 524, judgment vacated and case remanded, 350 U.S. 956; and at 235 F. 2d 327, rehearing denied, 237 F. 2d 165.

JURISDICTION

The judgment of the court of appeals (App., *infra*, p. 30) was entered October 5, 1959. An extension of

time to March 3, 1960, within which to apply for a writ of certiorari was granted by Mr. Justice Black on December 30, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the United States is required to pay, as compensation for the frustration by condemnation of a flowage easement owned by a power company over land riparian to an interstate navigable stream, the value of the subservient land for agricultural or forestry uses.

2. Whether such compensation must also include so-called severance damage to the remaining part of the tract not embraced in the power company's easement.

STATEMENT

This is a sequel to the case by the same name which was before this Court in No. 41, October Term, 1955, in which certiorari was granted, the judgment below was vacated, and the case was remanded to the court of appeals for further consideration in the light of *United States* v. *Twin City Power Co.*, 350 U.S. 222. *United States* v. *Virginia Electric & Power Co.*, 350 U.S. 956. The facts of the case in its current posture may be summarized as follows:

The Dan River, the principal tributary of the Roanoke River, is a navigable stream. In 1944, Congress, declaring its intention "to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized," approved projects in various areas of the country, including a general plan for the comprehensive de-

velopment of the Roanoke River Basin as "recommended by the Chief of Engineers in House Document Numbered 650, Seventy-eighth Congress, second session." Act of December 22, 1944, 58 Stat 887, 888, 894. By the same Act and in implementation of the Buggs Island Reservoir on the Roanoke River in Virginia and North Carolina [now known as John H. Kerr Dam and Reservoir]," the project here involved. As stated in House Document No. 650, 78th Cong., 2d Sess., the specific navigation purposes of the project are "regulation of stream flow" and "assur[ing] the necessary minimum low flows" for completion of the channel between Palmyra Landing and Weldon in North Carolina (pp. 8–9, 76–77). The other principal objectives are flood control and power production (pp. 8–9, 80–81).

By a suit instituted in the United States District Court for the Western District of Virginia, the United States proceeded to condemn, *inter alia*, a flowage easement over the tract now involved, riparian to the Dan River, required for use in connection with the operation of the John H. Kerr Dam and Reservoir (R. 1–18).[1] The issue was how much compensation was owed for the imposition of that easement and to whom it should be paid.

The United States initially intended to condemn the fee title of this particular tract which is part of a large (7,400 acre) estate (called the Falkland Estate); but, at the urgent request of the fee owner, the estate to be taken was reduced to a flowage ease-

[1] "R." references are to the appendix for the United States filed in the court of appeals.

ment, leaving the owner both with subsurface rights and control of the shore[2] (R. 198-207; App. *infra*, p. 26). In exchange, the fee owner (Mrs. Olive Vaughan Williams) offered an "Option for Purchase of Flowage Easement," accepted on behalf of the United States, in which she settled her claims arising out of the taking of the flowage easement. The instrument recited that it was "in consideration of One Dollar ($1.00) and other valuable considerations" (R. 73). The respondent Power Company held a long-dormant flowage easement over the tract. Its interests in the tract were described in a statement of facts agreed upon at pre-trial conference as (R. 87):

> Water rights, water power and water privileges, including the right to construct and maintain a dam or dams or other works on said lands and to raise the water at the head of Hyco Falls in the Dan River six feet above the usual water level without compensation for damages caused thereby.

The settlement with Mrs. Williams was expressly subject to "such water, flowage, riparian and other rights, if any" of the Power Company (R. 79). Thus, the sole question litigated in this proceeding was the compensation, if any, owing to the Power Company.

Like the claims asserted by the Twin City Power Company in the then pending condemnation cases involving that power company, the Virginia Electric and Power Company here claimed substantial compensation for its rights "due to the location of the land involved and its availability, at the time of the tak-

[2] The easement granted the United States rights of access for project operation purposes (R. 73).

ing and in the reasonably near future, for water power development purposes" (R. 28). Unlike the *Twin City* cases, the alleged value of the respondent Power Company's flowage right was thought to be, in the words of the trial court, "the fee simple value of the land" (R. 57). When the Twin City claim was rejected by this Court, *United States* v. *Twin City Power Co.*, 350 U.S. 222, the Court remanded this case for re-examination in the light of that rejection. *United States* v. *Virginia Electric & Power Co.*, 350 U.S. 956. After reargument, the court of appeals vacated the judgment of the district court and remanded the case, recognizing that availability of the land as a site for water power development could not be considered, but holding that this Court's decision did not exclude compensation for other elements of value, such as for agricultural or grazing purposes, and expressing its views as to how an award should be reached, which was elaborated upon in an opinion denying rehearing. 235 F. 2d 327; 237 F. 2d 165.

On remand, the district court overruled a demand by the United States for a jury trial and appointed commissioners to determine the award to be made to the respondent (R. 106–110). The commissioners were instructed, *inter alia* (R. 112): "In making your determination of fair market value, you should disregard the fact that Virginia Electric and Power Company has a perpetual flowage easement over some of the land involved in this case and that the owner of the fee, Olive Vaughan Williams, and the United States made an option contract dated April 30, 1951, and you are further instructed that you should not

attempt to determine the value of the respective interests of the owner of the fee or of such flowage easement." The district court adopted the commissioners' answer to one of the inquiries propounded to them and accordingly awarded respondent $65,520, an amount even greater than the previous award of $61,600, which had been based upon the fee simple value of the land underlying the claimed flowage rights. The "*res*" valued was the before-and-after value of the Falkland Estate (owned by Mrs. Williams) of some 7,400 acres rather than the respondent's claimed flowage easement involving only some 1,540 acres.[3] Included in the amount awarded was the sum of $11,720, representing so-called severance damages to the residue of the tract (R. 128). In line with references by the court of appeals to value for "agricultural or grazing purposes" (235 F. 2d at pp. 329,

[3] The "Second" inquiry posed to the commissioners, which the district court adopted as the proper measure of value in this case, is (R. 181–182, 186): "*Second:* What is the difference between the fair market value of the Falkland Tract, consisting of 7400 acres, with and without the servitude of the Government's easement, as described in Exhibit B hereto attached, assuming for the purpose of this inquiry that said easement is over the land in Tract FF–3100E up to contour 321 only, involving 1540 acres, determined as of October 23, 1952, excluding from both of such valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream?"

Counsel for the United States made clear its objections to the inquiries and instructions propounded to the commissioners (R. 194, 196). A motion to clarify the record in this respect had also been filed (R. 118–122). The Government additionally submitted requested instructions to the commissioners which were denied by the district court (R. 114–117, 123).

330), the evidence adduced by witnesses for respondent was directed to such uses of the land rather than to the value, if any, of the flowage easements constituting its claim of interest. The Government again appealed. The court of appeals again affirmed the award.

REASONS FOR GRANTING THE WRIT

1. The Power Company's easements were held and could be used only for the development of water power (R. 28; *supra*, pp. 4–5). It had no right to use the land for agricultural, grazing, or forestry purposes. When this Court held that the Power Company could not recover compensation on account of the frustration of its right so to develop the water power, by virtue of the exercise of the overriding federal commerce power, it would surely seem that the easement no longer had any substantial value since it is a truism that property that cannot be used is valueless. The view that, despite this Court's *Twin City* decision (*supra*, pp. 2, 5), the flowage easement of a power company would nevertheless have substantial value first appeared in this case on remand to the Fourth Circuit (235 F. 2d at 329–330; 237 F. 2d at 166; *supra*, p. 5) and was, by the Fourth Circuit, carried over to the *Twin City* case in connection with valuing the fee-owned lands of the Twin City Company. That company was, of course, entitled to compensation for its fee title land based upon uses other than water power development, but the court spoke in that case as if the flowage easement itself had other value.

United States v. *Twin City Power Company*, 248 F. 2d 108 (C.A. 4), certiorari denied, 356 U.S. 918.[4]

Including opinions on rehearing, the Fourth Circuit has now discussed this subject five times. The same view was adopted by the district court in Georgia upon assertion of the same claims by the Augusta Power Company. That case (*Augusta Power Company* v. *United States* (and reverse title) (C.A. 5, No. 18150)) is now awaiting decision by the United States Court of Appeals for the Fifth Circuit, having been argued on February 17, 1960. The several opinions of the various courts, as well as the arguments advanced to the Fifth Circuit, have made clear, what was perhaps earlier obscure, that the basis for these awards to power companies is that, while they had the right only to flood the lands for purpose of a water power development, that right gave them the potentiality of destroying agricultural and other uses and they must be paid for frustration of that possibility, measured by the amount the power company would have to pay the fee owner for such rights at the date of taking. Our short answer is that to charge the United States any price for such frustration would be simply to charge it indirectly for the exercise of the sovereign commerce power to develop navigable streams. Nothing in eminent domain law justifies such a result, and the *Twin City* ruling holds to the contrary.

2. The five opinions of the Fourth Circuit also show that it gives great importance to a completely irrelevant factor, *i.e.*, the rights of the fee owner. That

[4] Although appealing on other grounds to the Fifth Circuit, the Twin City Company did not present this issue to that court. *United States* v. *Twin City Power Company of Georgia*, 253 F. 2d 197, 205.

this element is irrelevant is seen if one considers the comparable case which would be presented under the established alternate procedure for exercising eminent domain. That alternate method is physical seizure, leaving anyone injured to his suit against the United States under the Tucker Act. But it is plain that, whatever the procedure, the amount of compensation is the same. *Hurley* v. *Kincaid*, 285 U.S. 95, 104; *United States* v. *Dow*, 357 U.S. 17, 21. In a Tucker Act suit by the power company, claims of interference with agriculture or timber uses—uses of which the utility company could not avail itself—would obviously be irrelevant. For in such a case the burden would be on the company to demonstrate how *it* had been injured by the government flooding of the land. The only interference with the *company's* interests would be with prospective flooding for power purposes, and that is precisely the value excluded by this Court's *Twin City* decision. The case here is exactly the same.

Perhaps the court of appeals was misled by the fact that the Power Company was joined as a defendant in the condemnation proceeding. That was done simply to furnish that company a forum for assertion of its claims, which the United States believed to be valueless. This Court's recent decision in *United States* v. *93.970 Acres*, 360 U.S. 328, shows that such joinder in a condemnation suit may properly be done without prejudice to any claim or defense of the United States.

The fundamental fallacy in the Fourth Circuit's reasoning is likewise clear from the settled principle

that the fact that the Government has settled with one of several condemnees is not to be ignored, nor does it enlarge the rights of the others or entitle them to compensation for more than the legal interest they themselves have in the property. *United States* v. *Petty Motor Co.*, 327 U.S. 372, 376; *Messer* v. *United States*, 157 F. 2d 793, 795 (C.A. 5); *Southern California Fisherman's Ass'n* v. *United States*, 174 F. 2d 739, 740 (C.A. 9). In this case, the United States had settled with the fee owner on her own terms and to her entire satisfaction (R. 47, 198–207; App., *infra*, p. 26; *supra*, pp. 3–4). But, under the instructions and inquiries to the commissioners, the United States received no consideration for its settlement with the fee owner. On the contrary, the commissioners were advised by the court: "* * * you are further instructed that you should not attempt to determine the value of the respective interests of the owner of the fee or of such flowage easement" (R. 112)—the latter being the sole thing for valuation in these proceedings. As stated in *Messer* v. *United States*, 157 F. 2d 793, 795, fn. 5 (C.A. 5):

> Where, as here, the Government settles with the owner of one interest, the question of compensation for all interests is irrelevant; only the question of just compensation for the interest taken concerns the Government. United States v. Petty Motor Co., 1946, 327 U.S. 372, 374, 66 S. Ct. 372.

See, also, *Mayor and City Council of Baltimore* v. *United States*, 147 F. 2d 786, 789 (C.A. 4).

The only compensation payable by the United States, whether the taking be in condemnation pro-

ceedings or by physical seizure followed by a Tucker Act suit, is to those with whose use of the property the taking has interfered. Here, they were the farmers or the timbermen, not the Power Company, and for such interferences full settlement has been made with the fee owner. The Power Company's approach would measure, at most, what it or another power company would have had to pay the landowners, before the taking, for the flowage rights. That, of course, is now beside the point. The question now is what, if any, *actual uses of the Power Company* were interfered with by the taking. The answer is plainly none.[5]

The Fourth Circuit has repeated in its various opinions (see *United States* v. *Twin City Power Company*, 248 F. 2d 108, at pp. 113–114, 115; App., *infra*,

[5] When the owners have, by their own division of title, lessened the value of the whole, the United States is not required to pay more than the market value of the individual interests, even though the total of those separated interests is less than the value of the whole if not so divided. *Boston Chamber of Commerce* v. *Boston*, 217 U.S. 189, 195; *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 76, 80; *Mayor and City Council of Baltimore* v. *United States*, 147 F. 2d 786, 789 (C.A. 4). In the instant case, the unencumbered fee value clearly did not exist in either property interest. The fee underlying the flowage easement condemned by the United States, having already been burdened by prior "floodage" rights, had undoubtedly suffered some diminution in value—if only because of the nuisance of a clouded title. On the other hand, the Power Company, plainly not being entitled to fee value because it did not own the fee, or to water power value against the United States in a navigable stream (*United States* v. *Twin City Power Co.*, 350 U.S. 222), failed to show—and, factually, cannot show—any substantial value for its claimed flowage rights.

p. 19) that the United States, under the rule we advocate, would be getting something for nothing. In the first place this is legally immaterial, since the owners' award "cannot be enhanced by any gain to the taker" (*United States* v. *Miller*, 317 U.S. 369, 375). More important, it is based on a misunderstanding of our position which is erroneously asserted to be (*Twin City, supra*, 248 F. 2d at 114) that "the owner of the fee cannot recover for the flooding because he has parted with the flowage easement". We have never so contended. Existence of the flowage easement diminished fee value only to the extent that there was a reasonable probability of its exercise and thereby a potential interference with agricultural and forestry uses. The circumstances of this case, where the easements (created in 1907, R. 229–236) were dormant and there was no sign of intent or ability of the Power Company to exercise them, indicated that their existence would have only minor effect on the value of the fee.[6] Dollars-and-cents proof of this fact is not present in this case because the Government settled with the fee owner on mutually agreeable terms.[7] In any event, a belief that in accepting the

[6] Factors such as availability of funds for development, difficulties of assemblage of all necessary lands, the increasing economic advantage of steam plants over hydroelectric plants, the need for additional power in the particular area, etc., may be such that the flowage easements are never exercised and are, for all practical purposes, abandoned.

[7] It is present in the *Augusta Power Co.* case in the Fifth Circuit where the Government paid fee value to the landowners and the power company is also claiming full value to the date of taking. The power company is there relying upon the imminence of the government flooding as proving lack of remaining value in the fee owner.

terms offered by the fee owner the United States acted unfairly to her is no ground for making a substantial award to the Power Company to which it was not entitled.[8]

3. Severance damages are to be paid when the taking of a portion of land in one ownership has diminished the value of the remaining part. In such a case, just compensation for the taking includes the lessened value of the residue. *E.g., Bauman* v. *Ross,* 167 U.S. 548, 574; *United States* v. *Grizzard,* 219 U.S. 180, 183; *United States* v. *Honolulu Plantation Co.,* 182 F. 2d 172 (C.A. 9), certiorari denied, 340 U.S. 820. In the words of the court in the last-cited case (pp. 175–176): "The rule applies exclusively to condemnation of fee simple title of a tract in one ownership."[9] In addition to the "fee simple title" limita-

[8] Insofar as respondent is concerned, the Fourth Circuit's emphasis on the cost to it of obtaining the easement is plainly erroneous. The actual cost to the Power Company in 1907 does not appear; in any event, "Original cost is well termed the 'false standard of the past' where, as here, present market value in no way reflects that cost". *United States* v. *Toronto Nav. Co.,* 338 U.S. 376, 403. As we have indicated, the present value of respondent's easement bears no relation to the cost of creation of the easement. It is settled that, where the easement has not been proved to be of any value, no damages, or at best nominal damages, are sustained upon condemnation. See *Northern Pac. Ry. Co.* v. *North American Tel. Co.,* 230 Fed. 347, 354–359 (C.A. 8), and cases there discussed.

[9] The court of appeals was there even more explicit. It stated (182 F. 2d at pp. 178–179): "The rule requiring compensation for loss in market value of the remainder of the tract is applied strictly only where there is but a single parcel *owned by one party in fee simple.* An extension of the doctrine permitted the inclusion of another parcel *in the same ownership* if it lay contiguous to the principal tract. * * * With some

tion, which alone would bar damages to the residue here, it is clear that the Ninth Circuit had much support in stating that the rule applies only to a tract in one ownership. *State* v. *Superior Court for Spokane County*, 10 Wash. 2d 362, 371, 116 P. 2d 752, 756; *McIntyre* v. *Board of County Com'rs*, 168 Kan. 115, 118–121, 211 P. 2d 59, 63–64; *Conness* v. *Indiana, I. & I. R. Co.*, 193 Ill. 464, 470–471, 62 N.E. 221, 223; *Glendenning* v. *Stahley*, 173 Ind. 674, 683–684, 91 N.E. 234, 238; *Tillman* v. *Lewisberg & N. R. Co.*, 133 Tenn. 554, 182 S.W. 597; *Duggan* v. *State*, 214 Iowa 230, 233, 242 N.W. 98, 99. As shown by these cases, different interests, even when held by husband and wife, brother and sister, or parent and child, do not warrant recovery of severance damages. While the court of appeals in the instant case purports to recognize the general rule that tracts vested in different persons cannot be considered as a whole for severance damage purpose (App., *infra*, pp. 27–29), the court fails to appreciate the scope of the principle under which different titles vested in different persons have repeatedly been held inadequate support for an award of severance damages.

Here, Mrs. Williams' interest was the fee title of all the tract. Respondent had an entirely different interest, claimed flowage rights (characterized by the court of appeals as "an executory right to sever")

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reluctance, the courts have held that the owner of one parcel *in fee* may be compensated for loss in market value thereof as a result of the taking of another parcel *owned in fee by him*, even if the latter is not contiguous, provided that, by actual and permanent use, a unitary purpose is served by both parcels * * *." (Emphasis added.).

over part of the land. Thus, we are clearly not dealing in this case with an instance of "condemnation of fee simple title of a tract in one ownership" to which the Ninth Circuit has held the rule of severance damages applies exclusively (182 F. 2d at pp. 175–176). It is no answer to say that, if the Power Company had been condemning an easement over Mrs. Williams' land, it would have had to pay *her* severance damages. The Power Company has no real interest in Mrs. Williams' various lands, yet the United States is now required to pay so-called severance damages *to the Power Company* for those lands. Moreover, any "severance damage" to flowage easements over land not embraced in the Government's condemnation would have to be based on some theory of interference with or frustration of a right to development of water power—contrary to this Court's ruling in *Twin City*.

4. In our view, the problem presented in this petition is developing into a serious one. Power companies will not be loath to seize upon the decisions in this case in an effort to give value to long-dormant—and for all practical purposes abandoned—flowage easements. The Fourth Circuit's present insistence upon its earlier ruling in this case, and its application of the same ruling in *Twin City* (248 F. 2d 108, *supra*), have demonstrated that its holding represents its considered view. Some district courts outside of the Fourth Circuit have relied upon that circuit's holding, to the detriment of the public which has been required to pay twice for the same property values. One such case is the *Augusta Power* case now awaiting decision

in the Fifth Circuit (*supra*, p. 8). Others will probably occur in the future. It is our understanding that, particularly in the earlier years of this century, it was the regular practice of many power companies to acquire easements in substantial numbers for possible development of water power sites as favorable circumstances might occur. In view of the continued acquisition of lands subject to power company flowage easements in connection with navigation improvement and other river and harbor projects, we believe that the errors and conflicts discussed in this petition should be resolved quickly.

We are not unmindful that the issues in this case were, in part, a subordinate point (pp. 14–18) in our petition for certiorari in *United States* v. *Twin City Power Co.*, No. 785, Oct. Term, 1957, certiorari denied, 356 U.S. 918. The primary ground of that petition related to lands owned in fee by the Power Company and the judgment as to the flowage easement question was not final since that issue had been remanded for trial. In contrast, the present decision is a final one; courts beyond the Fourth Circuit have followed its decision; the subsequent decisions and opinions, particularly the addition of the element of severance damage, have clarified the issue; and, finally, this Court's decisions in the *Dow* and *93.970 Acres* cases, *supra*, have intervened. For these reasons we think re-examination of the matter is warranted.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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MARCH 1960.

APPENDIX

In the United States Court of Appeals for the Fourth Circuit

No. 7882

UNITED STATES OF AMERICA, APPELLANT

v.

2979.72 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF HALIFAX, VIRGINIA, OLIVE VAUGHAN WILLIAMS, ET AL., AND UNKNOWN OWNERS (TRACT FF-3100E), APPELLEES

Appeal From the United States District Court for the Western District of Virginia, at Roanoke

JOHN PAUL, *District Judge*

(Argued June 24, 1959—Decided October 5, 1959)

Before SOPER and HAYNSWORTH, *Circuit Judges,* and THOMSEN, *District Judge*

SOPER, *Circuit Judge:*

The principal question in this case is whether an electric power company, which purchased from a riparian owner the right to flood the land, is entitled to any compensation when the United States takes over the right from the power company by condemnation. The owner of the fee in the land, having conveyed the flowage rights to the power company and thereby destroyed the value of the fee, agreed to convey the fee to the United States for $1.00, subject to the power company's rights, and the Government contends that the power company should be paid no more

because its right to flood the land has no value since it has no right to use the waters of the stream. If the Government's position is sustained, it will pay nothing for the right to flood the land and use it in connection with its flood control project.

The case first came before us in United States v. 2979.72 Acres of Land, 218 F. 2d 524. Condemnation proceedings by the United States were taken in connection with the John K. Kerr Dam and Reservoir, a flood control project on the Roanoke River in Virginia and North Carolina. In issue was the value of 1540 acres of land which the Virginia Electric and Power Company had an easement to flood permanently under a conveyance from Mrs. Olive Vaughan Williams, the owner of the fee. Mrs. Williams had agreed to convey to the Government for $1.00 any interest she may have retained in the land; and the value of the Power Company's interest was the question for decision in the condemnation proceedings to which both Mrs. Williams and the Power Company were made parties. The District Court found that the Power Company was entitled to recover $61,600 for the fee simple value of the land at $40.00 per acre and the Government appealed on the grounds (1) that in fixing the value of the land consideration had been improperly given to its availability for the development of a water power project in a navigable river, and (2) that in any event the Government was not liable for the fee simple value of the land but only for the difference between its value before and after the grant of the easement acquired by the United States.

We rejected the first ground for the reasons set forth in our opinion in United States v. Twin City Power Co., 215 F. 2d 592; where we held that the availability of land as a potential power site on a

navigable stream constituted an element of value for which just compensation must be made. On the second ground we also upheld the conclusion of the trial court. Since the evidence showed that the right to flood the land permanently left no use of any value to the owner of the fee and that land worth $40.00 an acre before the servitude of the easement was imposed was worth nothing thereafter, we found that the difference between the value of the land before and after the grant of the easement was the same as the fee simple value of the land.

Subsequently our decision in the *Twin City* case was reversed by the Supreme Court in United States v. Twin City Power Co., 350 U.S. 222, 76 S. Ct. 259, 100 L. Ed. 240, and it was held that, in condemnation of riparian land by the United States in order to improve the navigation of the stream, just compensation does not include the value of the water power in the flow of the stream; and, since we had not followed this rule, certiorari was granted in United States v. 2979.72 Acres of Land, supra, the judgment therein was vacated and the case was remanded to us for further consideration in the light of the Supreme Court's decision.

Accordingly, we reconsidered the case in United States v. 2979.72 Acres of Land, 235 F. 2d 327. In our opinion we pointed out that although the availability of the land as a site for water power development could not be considered in assessing damages against the United States, nothing in the opinion of the Supreme Court held that compensation should not be paid for other elements of value, such as value for agricultural or grazing purposes. In answer to the contention of the Government that the Power Company was entitled to receive nothing for the reason that its flowage rights were of value only for the purposes of water power development, we held that the

conveyance of the flowage rights by the owner of the fee to the Power Company vested in the latter an interest in the land that was being taken by the Government in condemnation therefor. The judgment of the District Court was accordingly vacated and the case remanded with direction to award compensation to the Power Company for the difference between the value of the land with and without the servitude of the easement, excluding from the valuation in both instances any element of value arising from the availability of the land for water power purposes. Subsequently, a petition for rehearing filed by the United States was denied, 4 Cir., 237 F. 2d 165.

On remand the District Court appointed commissioners to determine the amount of compensation to be paid by the United States. The area of 1540 acres of land over which the Power Company had a flowage easement was part of a larger tract of 7400 acres known as the Falkland tract. The easement of the Power Company comprised the right of permanent flowage over 1540 acres of the land up to a contour level of 321-feet, while the easement condemned by the Government involved the right of permanent and intermittent flowage over 1840 acres of land up to a level of 330-feet; and it was essential for the Government to acquire what the Power Company owned. The judge directed the commissioners to answer an inquiry, amongst others, as to what was the difference between the fair market value of the total Falkland tract with and without the servitude of the Government's easement, assuming that the easement was over the land up to contour 321 only, involving 1540 acres, excluding from both of such valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream. The commissioners

were further instructed that in making their determination of fair market value they should disregard the fact that the Power Company had a perpetual flowage easement over some of the land and that Mrs. Williams, the owner of the fee, had made an agreement with the United States and that they should not attempt to determine the value of the respective interests of the owner of the fee or of such flowage easement.

The commissioners found that the difference between the fair market value of the total Falkland tract before and after the taking of the easement to flood 1540 acres was $65,520, including all damages to the owners of the adjacent or remaining properties, and that of this sum $11,720 represented damages to the residue of the tract. The judge confirmed this award and the Government on this appeal now contends the award was erroneous, first, because the Power Company was entitled to only nominal damages since the availability of the site for water power development must be excluded from consideration in making the valuation and, second, because in any event the Power Company was not entitled to any damages to the residue of the estate.

It seems plain to us that the flowage easement of the Power Company had substantial market value in its hands in spite of the fact that the availability of land as a potential power site is not an element of value to be considered in the condemnation by the United States of a riparian owner's rights. Although it is true that the Power Company could not use the waters of the stream for power purposes except with the approval of the United States,[1] it is equally true that neither the United States nor anyone else could use the land in connection with the stream as a power

[1] See 16 U.S.C.A. § 797(e) et seq.

site so long as the Power Company possessed the flowage easement acquired from the owner of the fee. If Mrs. Williams were the owner of the entire interest in the land, no one would contend that she would not be entitled to compensation for flowage rights whether they were condemned or purchased by the Government or by any other person for navigational or power purposes; and her conveyance of the rights to the Power Company transferred to it the right to compensation for them. Obviously, anyone who desired to acquire the rights would expect to pay for them, and their value, whether in the hands of the owner of the fee or of her grantee, would be what they would bring in the open market.

In regard to this position, the Government says that a transfer or assignment of a claim to compensation from the United States is barred by the Anti-Assignment of Claims Act, 31 U.S.C.A. § 203, which provides that all transfers and assignments of any claim against the United States are null and void unless made after the allowance of the claim and the ascertainment of the amount due. It is obvious, however, that this statute has no bearing on the point. Mrs. Williams' conveyance was in no sense an assignment of a claim against the United States, for at the time it was made the United States had no interest in the property and no claim against the United States for compensation was in existence. The Power Company acquired title to an interest in the property in the shape of flowage rights by reason of the deed and was the owner thereof at the time that condemnation proceedings were begun by the United States. It seeks compensation in its own right and not as the assignee of another.[2]

[2] The decisions in United States v. Aetna Casualty & Surety Co., 338 U.S. 366, 374, 70 S. Ct. 207, 94 L. Ed. 171, and United States v.

The District Judge determined that the value of the interest of the Power Company for which compensation must be paid was the difference, as found by the commissioners, between the market value of the Falkland tract before and after the taking of the easement by the United States amounting to $65,520, comprising $53,800 with respect to 1540 acres of land up to Contour 321 covered by the Power Company's easement and $11,720 for damages to the residue of the tract. There was abundant evidence to support these figures since the estimates of the real estate experts produced by the Power Company were greatly in excess of the amounts found by the commissioners, and the Government offered no evidence in rebuttal.

The Government concedes that the measure of value used by the commissioners under the instruction of the court would be proper if the interest of the owner of a fee rather than the interest of the Power Company were being condemned; but the Government contends that this measure is inapposite to the factual situation before the court since it results in awarding to the Power Company the value of the land for such uses as agriculture and forestry to which the Power Company had no claim. We are told that this mistake of the District Court had its origin in our second opinion in this case, where we said, 235 F.2d at p. 329, in obedience to the ruling of the Supreme Court, that the availability of the site for water power development must be excluded in mak-

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Shannon, 342 U.S. 288, 292, 72 S. Ct. 286, 96 L. Ed. 321, disclose the purposes of the anti-assignment statute and show that transactions within the literal terms of the statute but not within its purposes may be excluded, such as devolutions of title by force of law without any act of the parties, and the right of an insurance company to collect a claim against the United States to which the company has been subrogated by payment to the insured.

ing the valuation of the Power Company's interest, but added that other elements not related to the flow of the stream, such as the value of the land for agricultural or grazing purposes, might be considered.

When this statement is wrenched from the context in the course of the Government's argument it is undoubtedly incorrect insofar as it indicates that the Power Company was entitled to compensation on the theory that it possessed the right to use the land for agricultural and forestry purposes; but the fact is that we made no such holding then and make none now. The statement was made in order to eliminate from the computation any consideration of the value of the property as a power site and to confine attention to other elements of value which the property possessed, and it was not irrelevant. On the contrary it had a direct bearing on the question before the court, for the cost of acquiring a permanent flowage easement over agricultural or wooded land is directly related to the uses for which the land is adapted; and if the exercise of the easement destroys these uses, their value determines the market price of the easement. It goes without saying that owners of farm lands demand at least the value of their lands for agricultural purposes when dealing with purchasers of water power sites, and the Government suffers no injustice in this case when it is required to pay a price which is limited to the value of the lands for ordinary purposes.

The United States complains that the entire amount of the damages to the property has been awarded to the Power Company and none to Mrs. Williams for her interest and hence the United States got no credit for the settlement it made with her as the owner of the fee. The fact is, however, as we have shown, that Mrs. Williams had no interest of substantial value

in that part of the land covered by the Power Company's easement. She agreed to convey to the United States the right to overflow land to the extent of 1840 acres up to the 330-foot contour line so far as might be necessary for the Government project, subject however to the rights of the Power Company to flood 1540 acres of land up to the 321-foot contour line. In the body of her agreement the purchase price of her rights is stated to be $1.00, and her attorney testified at the hearing below that she made no claim to compensation for the easement over the 1540 acres other than the sum of $1.00 mentioned in the agreement.

In the introductory words of the agreement mention is made of a consideration of $1.00 "and other valuable considerations"; and there was put in evidence correspondence between her attorney and the manager of the Government project, in which the attorney stated that if the Government would accept a conveyance of her riparian rights between Contours 318 (321) and 330 and would not insist upon taking a fee simple title she would be able to retain and develop 1,000 acres of land for a wild game conservation project, which had been long in use, and that she would convey the additional easement for a nominal sum. It would appear from the replies received to this offer and from the condemnation proceedings that the suggestion was accepted and, accordingly, the purchase agreement was executed. It is obvious, however, that the additional considerations mentioned in the agreement referred only to the additional territory between Contour 321 and Contour 330 which the Government desired to acquire. The Government was justified in giving nothing to Mrs. Williams for the right to flood this additional area because of her agreement; but we find no justification

for the contention that the Government should not pay the Power Company for the interest which it had acquired in the Falkland tract.

The amount which the District Court awarded to the Power Company was limited to the reduction in the fair market value of the Falkland tract as a result of the easement taken by the Government, assuming that such easement involved only the 1,540 acres covered by the Power Company's easement. The Power Company and its predecessors had presumably paid for that easement the fair market value of the 1,540 acres for agricultural purposes plus severance damages to the rest of the tract.

The question as to severance damages arises because the commissioners included the sum of $11,720 for severance damages in the total of $65,520 which they found to be the difference between the fair market value of the Falkland tract before and after the taking by the United States of a flowage easement limited to the extent of the flowage easement which belonged to the Power Company. The judge held that the entire amount should be paid as compensation to the Power Company for the taking of its easement. The Government, without waiving its contention that the Power Company had no compensable interest in the property, advances the additional argument that under settled law severance damages are not allowable in the situation before the court.

The rule ordinarily applicable when a portion of an owner's land is taken in condemnation is that compensation must be paid not only for the land actually taken but also for damages to the remainder of the tract; but the rule contemplates a single piece or tract of land and does not extend to separate tracts which the owner may have in the same neighborhood unless they are so inseparably connected in use that

the injury or taking of one necessarily injures the other. It is also generally held that tracts vested in different persons cannot be considered as a whole although used as one.[3] It is apparent, in view of these decisions, that an inquiry into the question of severance damages was appropriate when the Government condemned part of the Falkland tract, which was held in single ownership by Mrs. Williams subject to the Power Company's easement. The easement acquired by the Power Company had not actually severed the 1540 acres from the rest of the Falkland tract, but gave the Power Company an executory right to sever, which had value and which the United States has appropriated as part of its condemnation. The evidence produced before the commissioners proved the existence and the amount of such damages and was uncontradicted. The amount of such severance damages awarded to the Power Company was limited by the assumption, in the question put to the commissioners, that the easement taken by the Government ran only to Contour 321 and therefore involved only the 1540 acres covered by the Power Company's easement. It is of course true that Mrs. Williams and not the Power

[3] United States v. Miller, 1943, 317 U.S. 369, 375–376, 63 S. Ct. 276, 87 L. Ed. 336, 147 A.L.R. 55; Bauman v. Ross, 1897, 167 U.S. 548, 574, 17 S. Ct. 966, 42 L. Ed. 270; United States v. Grizzard, 1911, 219 U.S. 180, 184–185, 31 S. Ct. 162, 55 L. Ed. 165, 31 L.R.A., N.S., 1135; Baetjer v. United States, 1 Cir., 1944, 143 F. 2d 391, 394–395, certiorari denied, 323 U.S. 772, 65 S. Ct. 131, 89 L. Ed. 618; United States v. Honolulu Plantation Co., 9 Cir., 1950, 182 F. 2d 172, 176–179, certiorari denied, 1950, 340 U.S. 820, 71 S. Ct. 51, 95 L. Ed. 602; United States v. Mills, 8 Cir., 1956, 237 F. 2d 401, 6 A.L.R. 2d 1197; Cole Investment Co. v. United States, 9 Cir., 1958, 258 F. 2d 203; McIntyre v. Board of County Com'rs, 1959, 168 Kan. 115, 211 P. 2d 59; 18 Am. Jur., Eminent Domain, § 272, p. 912.

Company was entitled to the severance damages caused by the taking of the additional easement up to contour level 330, and that she has made a settlement with the Government of all of her claims; but the market value of the interest of the Power Company may nevertheless be measured by what it would cost to acquire it, and this necessarily includes not only the value of the land for agricultural and forestry purposes but also the damages to the remainder of the tract. Anyone who desired to acquire the easement would expect to pay not only the damages suffered by the owner for the destruction of the land for ordinary purposes, but also for the damages inflicted upon the remainder of the tract. The judgment of the District Court will accordingly be affirmed.

Affirmed.

JUDGMENT

Filed and entered October 5, 1959

In the United States Court of Appeals for the Fourth Circuit

No. 7882

UNITED STATES OF AMERICA, APPELLANT

v.

2979.72 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF HALIFAX, VIRGINIA, OLIVE VAUGHAN WILLIAMS, ET AL., AND UNKNOWN OWNERS (TRACT FF-3100E), APPELLEES

Appeal from the United States District Court for the Western District of Virginia

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

MORRIS A. SOPER,
United States Circuit Judge.

October 5, 1959.

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